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No. 81-8

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

DOROTHY BROWN
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the documentary evidence introduced against Petitioner should have been suppressed because it was obtained under a general warrant, in violation of the Fourth Amendment.

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DORTHY BROWN
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vs.

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*Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Dorothy Brown prays for issuance of a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 5, 1981.

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Sixth Circuit is an unpublished Order entered May 5, 1981 (1a)**.

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* The caption contains the names of all the parties to the proceedings in the Court of Appeals. William J. Brown, DPM, was also a defendant in the proceedings in the District Court.

** Parenthetical number references are to pages in the Appendix.

The sentence of the District Court was entered June 13, 1980 (50a), upon a jury verdict entered on April 25, 1980. Opinions of the District Court denying motions to supress evidence were entered on February 28, 1980, and April 22, 1980 9a, 11a).

A decision of the District Court in a related civil case brought pursuant to Federal Rule of Criminal Procedure 41(e) was entered on May 24, 1978 (2a, 8a).

CONCISE STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to hear this case on certiorari under 28 U.S.C. §1254(1). A written Order was issued by the United States Court of Appeals for the Sixth Circuit on May 5, 1981 (1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and 18 U.S.C. §§2(a), 287, 1001 and 1341 are reprinted in the Appendix at pages 83a through 88a.

CONCISE STATEMENT OF THE CASE

On Feburary 23, 1978, a search warrant issued by a U.S. Magistrate was executed on the office of William J. Brown, D.P.M. (20a, 22a). The warrant directed the seizure of:

> "Records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—'Day Sheets'
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001[.]"

The search warrant affiant was the government's chief investigator, Deirdre Flannery-Tenaka (17a, 63a, 64a), an investigator for the Department of Health, Education and Welfare. She began her investigation in November of 1976 (63a) a half a year after she was assigned the case (63a).

Ms. Flannery's affidavit related allegations of three former patients and two former employees of Dr. Brown. The affidavit said that one patient told Ms. Flannery that in 1975 she complained to the Social Security office about five Medicare claims submitted by Dr. Brown's office for services not received. Another former patient told Ms. Flannery that at an unspecified time, Dr. Brown billed Medicare for the removal of five toenails when work was done on only four. The third former patient told the affiant that in 1975, Dr. Brown made a claim to an unspecified person or agency for three injections the patient said he never received. The two former employees alleged that Medicare and Blue Shield records had been falsified. The periods of employment of these employees were not stated in the affidavit. The dates or frequency of the alleged falsifications or the names of the patients whose files were supposedly falsified were not recited in the affidavit.

The warrant was executed by Ms. Flannery and four FBI agents (35a, 36a). The search began at 3:30 p.m. and ended at 7:00 p.m. (56a, 66a). Every file in the office was searched (37a, 38a). Approximately 1,676 complete patient files, including "the file jackets and all material contained therein," were taken (53a, 54a, 57a). One-half to two-thirds of all files in the office were taken (33a). The files that Ms. Flannery said "she did not want" were left (38a). All files with a medical chart and any insurance paper in them were taken (13a, 34a, 61a, 66a).

On March 9, 1978, Dr. Brown filed a Rule 41 Motion (41a) in a separate civil case (WD Mich No. 78-29M) seeking the return of the seized property and suppression of the items seized. Petitioner Dorothy Brown was not a party to this proceeding (2a). The Motion was denied without hearing in a written opinion filed May 24, 1978 (2a, 5a, 8a).

On October 19, 1979, a 55-count Indictment was filed against Petitioner Dorothy Brown and her husband, Dr. William Brown (23a). The District Court had jurisdiction to try the charges under 18 U.S.C. §3231.

Counts 24 through 34 of the Indictment charged violations of 18 U.S.C §1001, the statute referenced in the search warrant. These Counts accused the Browns of knowingly submitting false Medicare claims.

The first 23 counts of the Indictment charged that the Browns violated 18 U.S.C. §287 by knowingly making false Medicaid claims.

The last 21 counts of the Indictment charged the Browns with using the mails to defraud Blue Shield of Michigan, in violation of 18 U.S.C. §1341, by knowingly submitting claims for medical services which "were in fact not received on the dates specified."

Only 29 patients of the 1,676 whose files were seized were mentioned in the indictment.

On November 8, 1979, the Browns filed a Motion in this case for return of property and suppression of evidence, on the grounds that the search warrant was unconstitutionally overbroad and exceeded the foundation of probable cause (42a).

Judge Gibson denied the suppression motion in an Opinion and Order filed February 28, 1980, which adopted by reference Judge Fox's Opinion in Case No. 78-29M (9a).

On March 21, 1980, the Browns renewed their Motions to Suppress, citing the then recently decided case of *US* v *Abrams*, 615 F2d 541 (1st Cir. 1980) (48a). Judge Gibson partially granted the Motion during trial suppressing:

> "all items seized . . . except patient medical charts, daily log sheets, (day sheets), patient ledger sheets and insurance claims forms or claims forms in connection with Medicare and/or Medicaid." (15a)

On April 22, 1980, Judge Gibson filed a written Opinion suppressing documents "of a type not specified on the face of the warrant" (11a).

Dr. Brown was acquitted on all counts. Mrs. Brown was convicted on 30 of the 35 counts that went to the jury. She was sentenced to pay a total of $3,000 in fines and to one year incarceration, which was suspended upon condition that she successfully complete two years' probation (50a).

She appealed to the U.S. Court of Appeals for the Sixth Circuit (31a) claiming that the District Court erred in failing to suppress materials seized during execution of a warrant void for overbreadth (73a). Mrs. Brown cited similar cases from other Circuits holding that warrants describing the things to be seized in terms of the statute which the evidence is alleged to violate are overbroad (73a). The Court of Appeals upheld the conviction in an unpublished Order, over the dissent of Judge Jones (1a).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

A. The Sixth Circuit's Decision Directly Conflicts with the First Circuit's Decision in the Nearly Identical Case of *US* v *Abrams*.

US v *Abrams*, 615 F2d 541 (1st Cir. 1980) presented facts nearly identical to the ones presented in this case. Without distinguishing *Abrams*, the Sixth Circuit reached a directly contrary result. A clear conflict between the Circuits exists.

Abrams involved an HEW investigation of Medicare fraud. So did this case. The *Abrams* investigation began, like the Brown investigation, when former employee-informants told the government that Medicare bills had been submitted for work not done.

The *Abrams* warrant authorized seizure of:

> "[C]ertain business and billing and medical records of patients Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001[.]" *US* v *Abrams*, 615 F2d at 542. (79a-80a)

The Brown warrant authorized seizure of:

> "records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—'Day Sheets'
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001[.]" (20a)

In each case all Medicare and Medicaid records and some additional records were seized. Each search lasted about three and one-half hours.

The *Abrams* Court found the warrant overbroad saying:

> "The warrant at issue fails to meet the requirement of particularity. The officers' discretion was unfettered, there is no limitation as to time and there is no description as to what specific records are to be seized. As a result of this general description, the executing officers seized all of the Medicare and Medicaid records of the three doctors and, in addition, records of non-Medicare-Medicaid patients. It seems clear that the executing officers could not or made no attempt to distinguish bona fide records

> from fraudulent ones so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent." 615 F2d at 543.

What was said about the *Abrams* warrant applies with equal force to the warrant in this case. There was no time limit on the records to be seized from the office. Records 25 years old were seized, even though they antedated both the period of limitations and the Medicare and Medicaid Acts (42a-43a, 46a-47a, 68a).

The files taken filled up the trunk and backseat of Ms. Flannery's car (38a) and constituted one-half to two-thirds of all the files in the office (53a, 63a). The government made a detailed examination of the 1,676 seized files in the year and a half before 29 of them were selected for inclusion in an Indictment (64a, 65a, 69a, 70a, 71a).

The officers executing the Brown warrant made no effort "to distinguish bona fide records from fraudulent ones", seizing all Ms. Flannery "wanted" instead so that they could be perused at leisure later (38a, 66a-67a).

The *Abrams* warrant was less specific than the warrant in this case. Both warrants called for the seizure of records "in violation of" 18 U.S.C. §1001 (20a, 80a). However, the *Abrams* warrant indicated that the nature of the fraud that would be shown by the records had to do with Medicare and Medicaid. The *Abrams* warrant said the records would show both actual services performed and fraudulent services claimed. It was at least implied that the agents executing the warrant could find what they were looking for by comparing sets of records.

The *Brown* warrant, by contrast, did not specifiy the nature of the fraud to be shown by the records to be seized. The warrant did not suggest that the documents would show a discrepency between what was done and what was billed.

There is a striking similarity between the *Abrams* warrant's description of the categories of records to be seized and the description in the *Brown* warrant.

The *Abrams* warrant directed the seizure of "business and billing and medical records of patients." The *Brown* warrant called for the seizure of "records, books and accounts pertaining to" the financial and medical records of patients.

The *Brown* warrant directed seizure of "records, books and accounts pertaining to . . . patient medical charts . . ." The *Abrams* warrant called for seizure of "medical records of patients."

The similarity between *Abrams* and this case extends to the affidavits for search warrants, which are reprinted in the appendix[1] (17a, 74a). Both affidavits recited allegations of a few former employees and patients that claims had been submitted for work not done. The *Abrams* affidavit said there were at least 50 incidents of overbilling (77a). The *Brown* affidavit mentioned only nine specific instances of alleged overbilling. The dates of employment of the former employees were not given in either affidavit. No claim was made in either affidavit that every Medicare and Medicaid file contained fraudulent information.

The search warrant in this case could have described with particularity the documents to be seized (i.e. the records of the patient-information or records which showed billings to Medicaid for services not shown on patient charts). It could have given a timeframe (i.e. the periods of employment of the informant-clerks). It could have described the natu of the fraud being investigated. It could

[1] This Court can take judicial notice, under FRE 201, of the records in the *Abrams* case. *US* v *Jones*, 580 F2d 219, 223 (6th Cir. 1978) The contents of the affidavit, warrant and return in *Abrams* are beyond dispute. The accuracy of the appendix can be easily ascertained by comparing it with the official, public record of the Massachusetts District Court. The *Abrams* affidavit was also quoted in the margin of the decision. 615 F2d at 543 n. 6.

have said how billing records could be compared with patient charts to determine which records were "in violation of" 18 U.S.C. §1001. The Sixth Circuit's failure to require the specificity which could easily have been incorporated in the warrant conflicts directly with the decision in *US* v *Abrams*, 615 F2d 541, 545 (1st Cir. 1980).

Abrams cannot be distinguished on its facts. It is nearly identical to this case except for the result. This clear conflict between the Circuits should be resolved.

B. The Sixth Circuit's Decision Conflicts with Other Well-Reasoned Decisions of the First Circuit.

The Sixth Circuit's decision in this case conflicts with *Application of Lafayette Academy, Inc*, 610 F2d 1 (1st Cir. 1979), a case where the warrant authorized seizure of a laundry list of items in violation of "18 U.S.C. Sections 286, 287, 371, 1001 and 1014." The warrant's particularization of items to be seized in *Lafayette Academy* was infinitely more detailed than the particularization of the things to be seized under the *Brown* warrant. However, the First Circuit found the warrant to be a general warrant saying:

> "[A] principal deficiency here is the lack of particularity in the phrase which purports to qualify and delineate the generic categories of items: the description 'books, papers . . . letters, correspondence, documents, . . . which are and constitute evidence of the commission of violations of the [federal conspiracy and fraud statutes]' provides insufficient guidance to the executing officer as to what items from among many he should seize. The qualifying phrase in effect does nothing to limit the broad warrant description." *Lafayette Academy*, supra, 610 F2d at 5.

In Petitioner Brown's case, as in *Lafayette Academy* and *Abrams*, the items to be seized were ultimately described by reference to sections of the U.S. Code allegedly violated.

Lafayette Academy, supra, 610 F2d at 4, n4, suggested simple measures to limit the generality of warrants authorizing seizure of great quantities of documents, such as specifying "time periods and the like."

US v *Roche*, 614 F2d 6 (1st Cir. 1980) involved search warrants issued to seize information concerning an extensive fraud scheme involving overcharges for automobile insurance. The warrants authorized seizure of:

> "books, records, documents, consisting of but not limited to insurance applications, premium notices, claims requests for recovery, correspondence relating to applications and claims, policies, ledger sheets, invoices, account journal, and office week ending progress reports which are evidence, fruits and instrumentalities of the violation of Title 18, United States Code, Section 1341." *US* v *Roche*, 614 F2d at 7.

The *Roche* Court said:

> Here, the government could have limited the objects of search and seizure to documents and records pertaining to automobile insurance, but declined to do so. This impermissibly broadened the scope of the search beyond the foundation of probable cause." *US* v *Roche*, 614 F2d at 7.

As in *Lafayette Academy*, supra, the Court expressed concern that the warrants were not limited to records generated in a stated period of time. *US* v *Roche*, 614 F2d at 7, n 1.

The *Brown* warrant was not limited to the specified instances of Medicare fraud recited in the affidavit. The unspecified instances of fraud directed against Blue Shield must have occurred, if at all, within the time of the informants' employment. However, the warrant was not limited to a search for records in that time frame. Having received limited information concerning wrongdoing, the government

chose to conduct a general, exploratory search to see if it could discover more. It did not let the Constitution stand in its way.

The First Circuit has struck down other warrants that describe records to be seized by reference to the statute they violate. See *US* v *Klein*, 565 F2d 183 (1st Cir. 1977), which was characterized this way in *US* v *Cortellesso*, 601 F2d 28, 31 (1st Cir. 1979), cert den 444 US 1072 (1980):

> "In *Klein* we required first, that the evidence presented to the magistrate must establish that there is reason to believe that a large collection of similar contraband is present on the premises to be searched, and second, that the evidence before the magistrate must explain the method by which the executing agents are to differentiate the contraband from the rest of defendant's inventory."

Even if it is assumed that Ms. Flannery's affidavit established reason to believe that there was a large quantity of records indicating a violation of 18 U.S.C. §1001 at Dr. Brown's office, there was no evidence before the Magistrate to explain "the method by which the executing agents are to differentiate" the records "in violation of" 18 U.S.C. §1001 from all others.

Montilla Records of Puerto Rico, Inc v *Morales*, 575 F2d 324 (1st Cir. 1978), dealt with the propriety of a search warrant which called for the seizure of sound recordings:

> "which have been manufactured from sound recordings protected by the Copyright Act without the permission of the sound recordings copyright owner, and all records relating to the manufacture, distribution and sale of unauthorized copies of copyrighted sound recordings . . ." 575 F2d at 325

The Court found the warrant in that case to be overbroad. The affidavit upon which it was based indicated that the premises to be searched were likely to have on them

illegally manufactured Motown sound recordings. The Court noted:

> "However, there is nothing in the search warrant that would indicate to the executing officer that his authority was limited to the seizure of only Motown records. It is obvious from the conduct of the agents who participated in the search that they did not consider their authority to be limited since they examined and seized recordings other than Motown.
>
> "The purpose of the particularity requirement in search warrants is to 'make general searches under them impossible and prevent[s] the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " 575 F2d at 326 (citation omitted)

The Court went on to say:

> "The warrant here could have easily been circumscribed to permit only the seizure of recordings bearing a Motown label." 575 F2d at 326

The Court held that the failure to specifically limit the seach warrant to the areas covered by the affidavit was a fatal defect and held the warrant invalid.

The warrant in this case would have been held unconstitutionally overbroad in the First Circuit. The Supreme Court should resolve this conflict.

C. The Sixth Circuit's Decision in this Case Also Conflicts with the Decisions of Other Circuits.

US v *Marti*, 421 F2d 1263, 1267, 1268 (2d Cir. 1970), struck down as overbroad a warrant which directed the seizure of "any property 'being used and/or possessed in

violation of " New York's obscenity statute. The Court said that:

> "This general direction on its face left to the executing officers the task of deciding which property was obscene in violation of the state obscenity law and thus subject to seizure.
>
> * * *
>
> "The warrants themselves gave no guidelines to the officers as to what is obscene and what is not."

The Court held the warrants:

> "deficient for failing to describe with particularity the items to be seized as required by the Fourth Amendment. The danger underlying such general warrants is that the person searched is at the mercy of the executing official." 421 F2d at 1268. (citations omitted)

In this case, the officers executing the warrants were given no guidance on how to determine what records were in violation of 18 U.S.C. §1001 and which ones were not. The Defendants Brown were "at the mercy of the executing official." If Ms. Flannery said she did not want a file, it stayed (58a). Otherwise, it was seized with all it contained. The warrant did not inform the Browns, as it was required to do, of what the officers were entitled to take. *Application of Lafayette Academy, Inc*, 610 F2d 1, 5 (1st Cir. 1979). By directing the seizure, in effect, of all documents related in any way to insurance, the warrant went beyond the limits of probable cause. *Lafayette Academy*, supra, 610 F2d at 5-6.

The decision in this case conflicts with *VonderAhe* v *Howland*, 508 F2d 364 (9th Cir. 1975). In *VonderAhe*, a dentist's former employee told the Internal Revenue Service that the dentist had not disclosed records of income for emergency work done in 1966 and 1967. An exact

description of the information allegedly withheld was given to the IRS agents. The Court said that:

> "In spite of the fact that the 'things' to be seized and the places to be searched were known to the Service with a high degree of specificity, the warrants as they were requested and issued were, for all practical purposes, 'general warrants.' " 508 F2d at 366.

The warrant authorized the seizure of the dentist's "fiscal records relating to . . . income and expenses . . ." including a large number of specified categories of items. 508 F2d at 366-367. The warrants took many hours and many agents to execute and resulted in the agents proceeding "to asport practically every piece of paper they could lay their hands on." 508 F2d at 365. The Court held that:

> "To proceed by the 'warrant' method without first seeking the desired papers by request or subpoena should be based upon the strongest showing of necessity but if such drastic procedure is to be availed of, it should be strictly limited as constitutionally required." 508 F2d at 369.

The Court also said that:

> "Upon the information available to it, the government knew exactly what it needed and wanted and where the records were located." 508 F2d at 370.

It held the warrants unconstitutionally overbroad.

US v *Drebin*, 557 F2d 1316, 1322-1323 (9th Cir. 1977), cert den 437 US 904 (1978), dealt with a warrant which directed the seizure of pirated films and:

> "books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and

> distribution of such motion pictures which are the fruits and instrumentalities of violations of Title [18], United States Code, 371 and 2314."

The Court held that:

> "Similar to [*US* v *Marti*, 421 F2d 1263 (2d Cir. 1970)], this warrant left to the executing officers the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally reproduced."

The Court held the warrant invalid.

The Eighth Circuit has required "some degree of particularity" as to the dates of records or documents to be seized pursuant to a search warrant where the affidavit for search warrant does not provide probable cause to believe that all records of a particular type are likely to be incriminating. In *Pieper* v *US*, 604 F2d 1131 (8th Cir. 1979), the Court suppressed 19 months worth of records which were seized under a warrant issued upon an affidavit showing only one violation.

At least three Circuits (the First, Second and Ninth) have decided cases invalidating warrants which described documents to be seized ultimately in the terms of the statute which they were alleged to have violated. A number of state courts have reached similar results. See *New York* v *Martin*, 267 NYS2d 404, 408-409 (S Ct 1966); *South Dakota* v *Nelson*, 169 NW2d 533, 535 (1969); *Connecticut* v *Johnson*, 273 A2d 702, 705 (1970). The decision of the Sixth Circuit in this case did not distinguish (or even mention) these authorities. A conflict exists between the Circuits on a significant question of constitutional law. This Court should grant certiorari to resolve the conflict.

II. THE DECISION OF THE COURT OF APPEALS SANCTIONS A SUBSTANTIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AND HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

> "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*'
>
> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford* v *Texas*, 379 US 476, 481 (1965). (Emphasis in original)
>
> "General searches have long been deemed to violate fundamental rights. It is plain that the [fourth] amendment forbids them." *Marron* v *US*, 275 US 192, 195 (1927).
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *FTC* v *American Tobacco Company*, 264 US 298, 306 (1924).

The search warrant issued in this case resulted in a general search. The officers executing the warrant rummaged at large through confidential medical records before carting off a carload full of them to review for months (58a, 59a, 67a, 68a, 69a). A great deal of irrelevant material was taken, since only 29 of the 1,676 files seized were used in the prosecution of Mrs. Brown. The Sixth

Circuit sanctioned this general search despite the decisions of this Court strictly construing the Fourth Amendment.

The warrant issued in this case was defective under *Andresen* v *Maryland*, 427 US 463, 480 (1976), which held:

> "General warrants of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrustion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized.' *Coolidge* v *New Hampshire*, 403 U.S. 443, 467 (1971). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford* v *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v *United States*, 275 U.S. at 196."

By directing the seizure of documents "in violation of Title 18, U.S.C. §1001" the Magistrate left it up to the executing officers to determine which documents violated the law and should be seized. Since the officers "had no guidance at all, they seized" all the records connected with insurance. Compare *US* v *Abrams*, 615 F2d 541, 544 (1st Cir. 1980).

The decision of the Sixth Circuit departed from the usual and accepted course of judicial proceedings as set forth by the decision of this Court in *Marcus* v *Search Warrants*, 367 US 717 (1961). Although *Marcus* is not directly controlling because it involved a due process claim under the Fourteenth Amendment rather than a claim under the Fourth Amendment, the warrants and procedure followed in *Marcus* to seize allegedly obscene material were deficient in the same way as the warrant and procedure followed in this case.

The Court described the warrants in *Marcus* this way:

> "The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene * * * publications.'
>
> * * *
>
> "It is plain that in many instances, if not in all, each officer actually made *ad hoc* decisions on the spot and, gauged by the number of publications seized and the time spent executing the warrants each decision was made with little opportunity for reflection and deliberation." 367 US at 732

In Petitioner Brown's case, there was little opportunity for reflection or deliberation by the officers executing the warrants. They were directed to seize documents and records "in violation of" 18 U.S.C. §1001. The warrant did not even repeat "the language of the statute." The decision on what to take was left to the discretion of the executing officers. Agent Harrell described the *ad hoc* process by which it was decided which files would be seized, saying:

> "We did not take all of his files. Miss Flannery would stipulate that there were certain files that she did not want as we were going through and we left those files." (58a)

Ms. Flannery testified that no effort was made to look for "Day Sheets" mentioned in the warrant (66a). If a file had a medical chart and any sort of insurance form in it, then it was taken to be perused at the government's leisure (13a, 54a, 58a, 61a, 66a-67a, 68a).

Ms. Flannery did not provide enough information to the Magistrate to establish probable cause to believe that every file with an insurance paper in it contained evidence of a

violation of 18 U.S.C. §1001. A search through all the files and the seizure of nearly 1,700 of them so they could be intensively reviewed for a year and a half was the sort of "exploratory rummaging" expressly prohibited by the decisions of this Court. Certiorari should be granted to review the decision of the Sixth Circuit.

CONCLUSION

A Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. Alternatively, a Writ of Certiorari should issue for the purpose of remanding to the Sixth Circuit for reconsideration and entry of an opinion providing a rationale for the decision reached.

Respectfully submitted,

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